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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JIM B. KIMBALL,

Plaintiff,

vs.

AMERICA'S WHOLESALE LENDER;
COUNTRYWIDE HOME LOANS, INC.; BAC
HOME LOAN SERVICING, LP, and
MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS; and DOES 1-10,

Defendant.

Case No. CV10-05670

**REPLY IN SUPPORT OF MOTION TO
DISMISS PLAINTIFF'S FIRST AMENDED
COMPLAINT**

[Fed. R. Civ. Proc. 12(b)(6)]

Date: June 16, 2011
Time: 1:30 p.m.
Place: Dept. 4

First Amended FAC Filed: March 4, 2011
Honorable Lucy Koh

I. INTRODUCTION

Plaintiff Jim Kimball's Opposition to Defendants' ¹ Motion to Dismiss the First Amended Complaint ("FAC") clarifies his purported basis for relief in this action; it also confirms that Plaintiff's claims should be dismissed with prejudice. In his Opposition, Plaintiff flatly states that because his loan was sold into a mortgage backed security, only the investor may foreclose. Not so. Plaintiff's assertion runs contrary to California law. It should come as no surprise that the only authority Plaintiff offers comes from outside of California and is entirely unpersuasive. A cursory

¹ The moving defendants are Countrywide Home Loans, Inc. dba America's Wholesale Lender ("CHL"), BAC Home Loans Servicing, LP ("BACHL") and Mortgage Electronic Registration Systems, Inc. ("MERS") (collectively "Defendants").

1 review of California and Ninth Circuit authority makes several propositions clear. First, a borrower
 2 may not bring an action to determine whether the owner of a note has authorized non-judicial
 3 foreclosure. To do so would undermine California's nonjudicial foreclosure statutory framework.
 4 Second, MERS has authority to initiate foreclosure, contrary to Plaintiff's claims. Third, Plaintiff
 5 makes claims which are explicitly contradicted by the terms of the Deed of Trust which he signed.

6 At the end of the day, Plaintiff's opposition makes it clear that not only does his pleading fail
 7 to state a claim, but that his underlying theory of relief is invalid. Plaintiff's transparent efforts to
 8 delay foreclosure despite reneging on his obligation to pay his mortgage should be quashed.

9 II. LEGAL ARGUMENT

10 A. Plaintiff May Not Maintain a Suit to Determine if the Noteholder Authorized 11 Foreclosure

12 As is now made apparent by the Opposition, Plaintiff seeks "a determination as to the rights
 13 of the parties based on sufficient evidence to determine whether Defendants own the Notes at issue
 14 and/or whether Defendants are acting on behalf of the true owner(s) of the Notes." Opp. at 3. That
 15 request was explicitly held invalid in *Gomes v. Countrywide Home Loans, Inc.*, 192 Cal. App. 4th
 16 1149 (2011).

17 In *Gomes*, the plaintiff filed suit alleging that claims nearly identical to Kimball's. There,
 18 the plaintiff alleged 1) that his loan was sold onto the secondary mortgage market; 2) that MERS did
 19 not have the authority to initiate foreclosure because it was only the nominee beneficiary; and 3) that
 20 he was entitled to determine by a declaratory relief action whether MERS had authority from the
 21 investor to initiate foreclosure. *Id.* at 1152-53. The Court of Appeal affirmed the dismissal of all
 22 claims with prejudice and offered several significant insights crucial to the resolution of Plaintiff
 23 Kimball's action.

24 The Court held that "Civil Code sections 2924 through 2924k" provide the "comprehensive
 25 framework for regulation of a non-judicial foreclosure sale pursuant to a power of sale contained in a
 26 deed of trust." *Id.* at 1154 citing *Moeller v. Lien*, 25 Cal. App. 4th 822, 830 (1994). With that in
 27 mind, the Court stated that Gomes "is seeking to impose the additional requirement that MERS
 28 demonstrate in court that it is authorized to initiate foreclosure. As we will explain, such a

1 requirement would be inconsistent with the policy behind non-judicial foreclosure of providing a
2 quick, inexpensive, and efficient remedy.” *Gomes*, 192 Cal. App. 4th at 1154, n.5. The Court went
3 on to say that “by asserting a right to bring a court action to determine whether the owner of the Note
4 has authorized its nominee to initiate the foreclosure process, Gomes is attempting to interject the
5 courts into this comprehensive nonjudicial scheme.” *Id.* at 1154. The Court further stated that
6 “nothing in the statutory provisions establishing the nonjudicial foreclosure process suggests that
7 such a judicial proceeding is permitted or contemplated.” *Id.* Finally, the Court held that “the
8 recognition of the right to bring a lawsuit to determine a nominee’s authorization to proceed with
9 foreclosure on behalf of the noteholder would fundamentally undermine the nonjudicial nature of the
10 process and introduce the possibility of lawsuits files solely for the purpose of delaying valid
11 foreclosures.” *Id.* at 1155.

12 *Gomes* disposes of Kimball’s entire action as the FAC relies on two flawed propositions that
13 squarely refuted in *Gomes*. First, Plaintiff claims that he has the right to maintain an action solely to
14 determine whether the investor authorized the initiation of nonjudicial foreclosure. *Opp.* at 1, 3, 5.
15 *Gomes* held the opposite. Plaintiff Kimball is trying to “interject the courts into th[e] comprehensive
16 nonjudicial scheme” of Civil Code Section 2924 et seq. *Id.* at 1154. If Plaintiff’s first proposition
17 were an acceptable basis on which to maintain a suit, Courts would be inundated with ligation
18 simply to “make sure” that the investor authorized MERS to initiate foreclosure. The Court in
19 *Gomes* recognized that risk, and explicitly disposed of Plaintiff’s purported basis for relief in this
20 action. Plaintiff’s theory would fundamentally alter the nonjudicial foreclosure statutory framework,
21 and turn each and every routine foreclosure, such as this case where Plaintiff admits no entitlement
22 to his Property, into a fully litigated matter. The law does not countenance Plaintiff’s attempts at
23 rewriting the California Civil Code. Therefore, as an initial matter, Plaintiff may not even maintain
24 this action to determine whether the investor authorized MERS to initiate foreclosure, which exposes
25 the second flaw in Plaintiff’s reasoning.

26 MERS has the authority to initiate foreclosure under California Civil Code section 2924 et
27 seq. and under the Deed of Trust. Plaintiff argues that MERS lacks the authority to initiate
28 foreclosure because “they lack authority from the owner of the notes.” *Opp.* at 9. This reasoning is

1 flawed as Plaintiff explicitly gave MERS the power to initiate foreclosure in the Deed of Trust. The
 2 Deed of Trust names MERS as the beneficiary. Request for Judicial Notice (“RJN”) Ex. A, p. 2. If
 3 a deed of trust contains an express provision granting a power of sale, a “*trustee, mortgagee or*
 4 *beneficiary or any of their authorized agents*” may institute the foreclosure process. Civ. Code
 5 § 2924(a)(1) (emph. added); *Ung v. Koehler*, 135 Cal. App. 4th 186, 192 (2005). The Deed in this
 6 action states that “**MERS** (as nominee for Lender and Lender’s successors and assigns) **has the**
 7 **right:** to exercise any or all of those interests, including, but not limited to, the right **to foreclose**
 8 **and sell the Property . . .**” RJN Ex. A, pps. 3-4 (emphasis added).

9 Again, *Gomes* is dispositive on this point. As in *Gomes*, Kimball “has not asserted *any*
 10 factual basis to suspect that MERS lacks authority to proceed with the foreclosure. He simply seeks
 11 the right to bring a lawsuit to find out *whether* MERS has such authority. No case law or statute
 12 authorizes such a speculative suit.” *Gomes*, 192 Cal. App. 4th at 1156. “As stated in the deed of
 13 trust, Gomes agreed by executing that document that MERS has the authority to initiate foreclosure.
 14 Specifically, Gomes agreed that ‘MERS (as nominee for Lender and Lender’s successor and assigns)
 15 . . . has the right to foreclose and sell the Property.’” *Id.* at 1157. Countless other Courts within this
 16 jurisdiction that have addressed Plaintiff’s assertions have come to the same conclusion. *See e.g.*
 17 *Hollins v. Recontrust, N.A.*, 2011 WL 1743291, *3 (C.D.Cal.,2011) (citing *Gomes* and dismissing
 18 claims that MERS had not shown authority to foreclose); *Monet v. Countrywide Home Loans*, 2011
 19 WL 1196461, *2 (N.D.Cal.,2011) (holding that MERS has authority to foreclose, citing *Gomes*);
 20 *Morgera v. Countrywide Home Loans, Inc.*, 2010 WL 160348, *8 (E.D.Cal. 2010) (same).

21 The similarities between Plaintiff’s meritless claims and the meritless *Gomes* complaint are
 22 striking. The Court should follow the interpretation of the California Civil Code as articulated in
 23 *Gomes* and hold the following: Plaintiff cannot maintain an action simply to determine if an investor
 24 authorized MERS to initiate foreclosure where Plaintiff explicitly gave MERS the authority to do so.

25 **B. Each of Plaintiff’s Claims Individually Fail**

26 Though Plaintiff’s underlying entitlement to relief has now been established as invalid, each
 27 individual claim also fails.

1. Plaintiff's Claim for Declaratory Judgment Fails as There is no Controversy

Plaintiff defends this cause of action by stating that “Kimball has sufficiently questioned whether Defendants have the right to follow through with the trustee’s sale already noticed with respect to the Subject Property.” Opp. at 16. As established above, *Gomes* explicitly held that no such right of action exists. To create such a right would inject trial courts into *every* nonjudicial foreclosure action, which would clearly run contrary to the California Civil Code. In *Hollins*, the Court dismissed a nearly identical declaratory relief claim, holding that to the extent Plaintiff’s claim that Defendant did not have authority to foreclose could not withstand a motion to dismiss. 2011 WL 1743291 at *3. The same reasoning applies to Kimball’s FAC. Accordingly, there is no controversy sufficient to sustain a claim for declaratory judgment.

2. The FAC Fails to State a Claim for Breach of The Covenant of Good Faith and Fair Dealing

The Opposition posits two factual bases to maintain a cause of action for breach of the covenant of good faith and fair dealing. Opp. at 17. First, Plaintiff complains that the foreclosing entity does not have the authority, and second, Plaintiff complains that he has not seen sufficient proof that the investor authorized foreclosure. Both of these claims are plainly invalid in light of *Gomes* and the other authorities cited above. Plaintiff has no legal right to maintain an action solely to question the authority of the beneficiary, to whom Plaintiff contractually granted the right to foreclose on the property upon his default. Plaintiff’s efforts to re-write the Note and Deeds should be discarded as frivolous and contrary to law.

3. Plaintiff's Quiet Title Claim Fails

Plaintiff’s Quiet Title theory is premised on the same misunderstanding of California law. The Opposition states that “Defendants have no authority to exercise the rights under the” Deeds of Trust. Opp. at 18. That flawed theory has already been discussed and proven invalid.

4. Plaintiff Abandoned his Claims for Intentional Misrepresentation, Negligent Misrepresentation, and Lack of Formation of Contract

Plaintiff simply declined to defend the three causes of action for intentional misrepresentation, negligent misrepresentation, and lack of formation of contract asserted in the

1 FAC. Defendants moved to dismiss all of those claims for reasons articulated in the Motion to
 2 Dismiss. The Fraud claims are time-barred and inadequately pled. Motion at 6-8. The Lack of
 3 Formation of Contract claim is simply unintelligible. Given Plaintiff's decision to abandon these
 4 claims, the Court should dismiss them with prejudice.

5 III. CONCLUSION

6 Plaintiff's entire action relies on the misconception that he has standing to interject the trial
 7 and district courts into California's nonjudicial foreclosure scheme. That is not the law. The Court
 8 in *Gomes* made it clear that the exclusive remedy framework by which to examine a foreclosing
 9 entity's authority is through Civil Code section 2924 et seq. Plaintiff's underlying theory of relief is
 10 simply invalid. Accordingly, the FAC should be dismissed with prejudice.

11
 12 DATED: June 2, 2011

13 /s/

14 Matthew J. Brady
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